

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MARQUETTA M.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

CASE NO. 3:21-CV-5664-DWC

ORDER

Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of Defendant's denial of Plaintiff's application for supplemental security income ("SSI"). Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. *See* Dkt. 5. After considering the record, the Court concludes that the Administrative Law Judge ("ALJ") harmfully erred in evaluating the medical opinion evidence, Plaintiff's subjective testimony, and lay witness evidence. The Court remands this case for an immediate award of benefits.

FACTUAL AND PROCEDURAL HISTORY

On April 5, 2018, Plaintiff filed applications for DIB and SSI, alleging disability as of May 1, 2013; this alleged onset date was later amended to December 31, 2015. *See* Dkt. 12, Administrative Record (“AR”) 17, 1444. The application was denied upon initial administrative review and on reconsideration. *See* AR 92–93, 122–23. A hearing was held before ALJ Allen G. Erickson on January 29, 2019. *See* AR 33–91. In a decision dated February 27, 2019, ALJ Erickson determined Plaintiff to be not disabled. *See* AR 14–32. Plaintiff’s request for review of the ALJ’s decision was denied by the Appeals Council, making the ALJ’s decision the final decision of the Commissioner. *See* AR 1–6; 20 C.F.R. § 404.981, § 416.1481. Plaintiff filed a complaint in this Court seeking review of the ALJ’s decision, leading to a reversal and remand for additional proceedings. AR 1524–37.

Subsequently, the Appeals Council remanded the case to ALJ Erickson, who held a new hearing and issued a new decision in which he again determined Plaintiff to be not disabled. AR 1440–94. Plaintiff appeals anew from this decision. Dkt. 8.

In Plaintiff’s Opening Brief, Plaintiff maintains the ALJ harmfully erred in: (1) evaluating the medical opinion evidence; (2) evaluating Plaintiff’s own testimony; and (3) evaluating lay witness evidence. Dkt. 17, p. 2. Plaintiff asks that this matter be remanded for an immediate award of benefits. *Id.* The Commissioner concedes that the ALJ erred in evaluating the medical opinion evidence, but does not concede error with respect to the other issues, and maintains that further proceedings are the proper remedy. Dkt. 21, p. 3. Given that there is no disagreement that the ALJ committed harmful error, the Court must determine whether to remand this matter for an award of benefits or for further administrative proceedings. In turn,

1 because resolving this question depends, in part, on resolution of plaintiff's other claims of error,
 2 the Court addresses these claims first.

3 STANDARD OF REVIEW

4 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
 5 social security benefits if the ALJ's findings are based on legal error or not supported by
 6 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th
 7 Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

8 DISCUSSION

9 1. Whether the ALJ Properly Evaluated Plaintiff's Subjective Testimony

10 Plaintiff assigns error to the ALJ's evaluation of her subjective symptom testimony. Dkt.
 11 17, p. 14. While the Commissioner's brief does not actually articulate any position on this issue,
 12 the Commissioner relies on the ALJ's analysis of Plaintiff's subjective testimony to argue that
 13 Plaintiff has failed to establish disability. Dkt. 21, pp. 4–5.

14 If an ALJ rejects the testimony of a claimant once an underlying impairment has been
 15 established, the ALJ must support the rejection “by offering specific, clear and convincing
 16 reasons for doing so.” *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (citing *Dodrill v.*
 17 *Shalala*, 12 F.3d 915, 918 (9th Cir.1993)); *see also Reddick v. Chater*, 157 F.3d 715, 722 (9th
 18 Cir. 1998) (citing *Bunnell v. Sullivan*, 947 F.2d 343, 346-47 (9th Cir. 1991)). As with all of the
 19 findings by the ALJ, the specific, clear and convincing reasons also must be supported by
 20 substantial evidence in the record as a whole. 42 U.S.C. § 405(g); *see also Bayliss*, 427 F.3d at
 21 1214 n.1 (citing *Tidwell*, 161 F.3d at 601).

1 Here, the ALJ rejected Plaintiff's testimony regarding her symptoms on the basis of (1)
2 improvement with conservative treatment; (2) Plaintiff's failure to comply with treatment
3 recommendations; and (3) normal mental status examinations.

4 With respect to the ALJ's first reason, an ALJ may properly discount a claimant's
5 testimony when the record shows the claimant "responded favorably to conservative
6 treatment[.]" *Tommasetti v. Astrue*, 533 F.3d 1035, 1039–40 (9th Cir. 2008). Here, the ALJ
7 found that "despite ongoing reported pain symptoms with limited medication compliance due to
8 reported side effects, [Plaintiff's] symptoms otherwise have been managed conservatively with
9 physical therapy." AR 1455. The ALJ's discussion of Plaintiff's treatment with physical therapy
10 does not refer to any evidence of improvement, as opposed to participation, in physical therapy.
11 *See* AR 1451. Indeed, as the ALJ notes, Plaintiff was referred to, and requested referrals to,
12 physical therapy, but Plaintiff also reported to her primary care provider "that she felt physical
13 therapy was not working[.]" AR 1451 (citing AR 400, 1293, 1770). Only in "one of her last
14 documented visits" to physical therapy did Plaintiff feel "her shoulder motion was a little better
15 but still 'catches' when she reached too far[.]" AR 1452 (citing AR 2220). This mention of
16 improvement, however, concerns only Plaintiff's shoulder impingement; nothing in the record
17 indicated similar improvement in Plaintiff's other physical symptoms, including intense nausea
18 and numbness in the hands and feet. AR 1479–80, 1490. Finally, the ALJ did not identify what
19 further treatment one might expect for this impairment.

20 With respect to the ALJ's second reason, this Court considered, and rejected, the ALJ's
21 finding that Plaintiff failed to adequately comply with treatment recommendations in the prior
22 remand. Therein, Judge Tsuchida wrote:
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1 The ALJ accurately noted that plaintiff reluctantly attended therapy,
2 showed sporadic attendance, and had a history of not taking medication for
3 diabetes, depression, and anxiety. [AR] 23. These points are not, however,
4 disputed. The Ninth Circuit has noted that “we do not punish the mentally ill for
5 occasionally going off their medication when the record affords compelling
6 reason to view such departures from prescribed treatment as part of claimants’
7 underlying mental afflictions.” *Garrison v. Colvin*, 759 F.3d 995, 1018 n. 24 (9th
8 Cir. 2014). As discussed earlier, Drs. Wingate, Wilkinson, and Parker
9 acknowledged plaintiff’s history of non-compliance with treatment and
10 medication yet concluded without qualifiers that plaintiff did not have the
11 capacity to perform full-time in a normal work environment due to mental-health
12 limitations. The ALJ cited no record evidence demonstrating that plaintiff’s
13 mental functioning improved to an extent that would enable performing full-time
14 work when she was maximally compliant with treatment. Although the ALJ
15 concluded that the record did not support plaintiff’s testimony that she was unable
16 to “stomach” her medications because they cause her to throw up, [AR] 24,
17 chronic nausea and vomiting have been the cause for plaintiff’s hospitalization
18 and treatment with anti-nausea medication since at least 2008. *See, e.g.*, [AR] 354,
19 364, 383, 395, 414, 447, 452, 456, 463, 468, 669, 705, 767, 798, 802, 867, 937,
20 967, 971, 989, 1101, 1124, 1145, 1159, 1211, 1220. True, plaintiff has stated her
21 reluctance to take antidepressants because “she did not want to wait a month for
22 them to begin working.” *See, e.g.*, [AR] 621 [footnote omitted]. Nonetheless, the
23 record demonstrates that the one medication she did not skip and demanded
24 regularly, and sometimes impatiently, was anti-nausea medication. Consistent
with her hearing testimony that she “can’t stomach” psychiatric medications
because of “throwing up,” [AR] 60, plaintiff informed Dr. Parker that “[s]he has
trouble keeping medicines down because she throws up very often,” [AR] 669.
There is no conflict between plaintiff’s difficulty in stomaching her medications
and her stated desire not to take them.

AR 1534–35.

17 The Commissioner has not shown any change in the evidence from the time of this prior
18 decision nor pointed to any change in the law that would render the ALJ’s reasoning better
19 supported. Indeed, Plaintiff continued to complain of constant nausea so severe as to, at times,
20 prevent her from ingesting anti-nausea medication or food, leading to significant weight loss. AR
21 1480–81. The ALJ’s continued reliance on Plaintiff’s non-compliance with medication regimens
22 was not a clear and convincing reason for discounting Plaintiff’s symptom testimony.

1 With respect to the ALJ's third reason, "[c]ontradiction with the medical record is a
2 sufficient basis for rejecting the claimant's subjective testimony." *Carmickle v. Comm'r, Soc.*
3 *Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008) (citing *Johnson v. Shalala*, 60 F.3d 1428, 1434
4 (9th Cir.1995)). However, an ALJ may not offer a selective summary of the medical evidence to
5 find an inconsistency where none exists. *See Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir.
6 2014); *see also Holohan v. Massanari*, 246 F.3d 1195, 1207 (9th Cir. 2001) (reversing ALJ's
7 selective reliance "on some entries in [the claimant's records while ignoring] the many others that
8 indicated continued, severe impairment"). Here, the ALJ pointed to mental status exams that
9 would "often document observations like neat appearance, good grooming, no psychomotor
10 agitation, normal eye contact, normal speech, logical stream of thought, linear and organized
11 thought content/process, appropriate thought content, cooperative and alert behavior, average
12 intellectual functioning, no suicidal ideation, intact/good insight/judgment, good memory, good
13 attention span, and good concentration." AR 1453 (citing AR 670, 686–88, 704, 706, 708, 710–
14 11, 717, 719, 721, 729–30, 737, 1063–72, 1301, 1940, 1945, 1949, 1951, 1954, 1957, 1963). The
15 citations to the record upon which the ALJ relied, however, also documented poor concentration
16 and confusion, depressed or anxious mood and depressed or flat affect, tearfulness, restless
17 behavior, and difficulty with memory, concentration, abstract thought, and insight. *See, e.g.* AR
18 670, 686–99, 706, 710, 717, 719, 721, 729–30, 737, 1301, 1963. To the extent the ALJ's finding
19 was based on a selective summary of the medical evidence that supported one conclusion while
20 omitting evidence that did not support such a conclusion, the ALJ erred. *See Ghanim*, 763 F.3d at
21 1164 (9th Cir. 2014) (ALJ may not "cherry-pick[]" items from treatment record without
22 considering them in context of "diagnoses and observations of impairment").
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1 2. Whether the ALJ Properly Evaluated Lay Witness Statements

2 Next, Plaintiff assigns error to the ALJ's evaluation of testimony from two lay witnesses.
3 Evidence from lay witnesses may be discounted when the ALJ "gives reasons germane to each
4 [source] for doing so." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012) (citations omitted).

5 The ALJ did not address a statement from Plaintiff's SSI facilitator in the decision. If the
6 ALJ has provided proper reasons to discount the lay testimony in another aspect of the written
7 decision, such as within the discussion of the claimant's testimony, the lay testimony may be
8 considered discounted properly even if the ALJ fails to link explicitly the proper reasons to
9 discount the lay testimony to the lay testimony itself. *See Molina*, 674 F.3d at 1121 (quoting
10 *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001)). Here, the ALJ's reasoning in discounting
11 Plaintiff's testimony was not supported by substantial evidence; thus, the ALJ's error in failing
12 to address lay witness testimony cannot be considered harmless.

13 The Commissioner asserts that "the evaluation of lay witness evidence has changed under
14 the new regulations where it is not required for an ALJ to articulate how they considered
15 evidence from a nonmedical source. 20 C.F.R. § 404.1520c(d), 416.920c(d)." Dkt. 21, p. 6. This
16 is a misstatement of the regulation. Section 416.920c(d) does *not* provide that an ALJ is not
17 required to evaluate lay-witness statements at all; it merely provides that an ALJ is not required
18 to evaluate non-medical evidence, such as lay-witness statements, using the factors set forth in
19 20 C.F.R. § 416.920c(a)-(c).

20 In addition, the ALJ found a function report from Plaintiff's cousin, Antoinette Williams,
21 unpersuasive "to the extent that they may suggest abilities more restricted than found in this
22 decision," including a lack of medical evidence supporting the claim that Plaintiff sometimes
23 required assistance at home. AR 1450. However, the ALJ did not indicate what sort of medical
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evidence could be expected to document instances of Plaintiff requesting and receiving help from her cousin around the house. This was not a germane reason to reject the entirety of Ms. Williams's opinion.

3. Whether Plaintiff's Claim May Be Remanded for an Immediate Award of Benefits

"The decision whether to remand a case for additional evidence, or simply to award benefits[,] is within the discretion of the court." *Trevizo v. Berryhill*, 871 F.3d 664, 682 (9th Cir. 2017) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). If an ALJ makes an error and the record is uncertain and ambiguous, the court should remand to the agency for further proceedings. *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017). Likewise, if the court concludes that additional proceedings can remedy the ALJ's errors, it should remand the case for further consideration. *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017).

The Ninth Circuit has developed a three-step analysis for determining when to remand for a direct award of benefits. Such remand is generally proper only where

"(1) the record has been fully developed and further administrative proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand."

Trevizo, 871 F.3d at 682–83 (quoting *Garrison*, 759 F.3d at 1020).

The Ninth Circuit emphasized in *Leon* that even when each element is satisfied, the district court retains discretion to remand for further proceedings or for award of benefits. 80 F.3d at 1045.

Here, both parties agree that the ALJ has failed to properly evaluate medical opinion evidence, satisfying the second element of the test. These medical opinions, from psychiatric consultative examiners Terilee Wingate, Ph.D., William R. Wilkinson, Ed.D., and James Parker,

1 M.D., each assessed Plaintiff with marked or severe limitations in maintaining appropriate
2 behavior in a work setting, interacting with the general public, and completing a normal workday
3 or work week without interruptions from psychologically based symptoms. AR 669–71, 1300,
4 2037–38. In the prior order remanding this case for further proceedings, this Court found harmful
5 error in the ALJ’s evaluation of all three opinions. AR 1529–34.

6 The Commissioner avers that further proceedings would serve a useful purpose of
7 allowing the ALJ to reevaluate the medical opinion evidence of record, reevaluate Plaintiff’s
8 maximum residual functional capacity, determine whether Plaintiff is able to do other work and
9 clarify the effect of assessed limitations on that ability, and offer Plaintiff the opportunity for a
10 new hearing and the submission of new evidence. Dkt. 21, p. 2. However, the Court is mindful
11 that this is the second time that the same evidence has been improperly evaluated. Providing yet
12 another opportunity to assess improperly evaluated evidence does not qualify as a remand for a
13 “useful purpose” under the first part of the credit as true analysis. *Garrison*, 759 F.3d at 1021–22
14 (citing *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004)) (“Allowing the Commissioner to
15 decide the issue again would create an unfair ‘heads we win; tails, let’s play again’ system of
16 disability benefits adjudication.”).

17 The Commissioner also avers that “the record in this case contains conflicts and
18 ambiguities that require resolution by a factfinder” and “serious doubts remain whether Plaintiff
19 is disabled.” Dkt. 21, p. 4. In support, the Commissioner recites an abundance of caselaw in
20 support of the proposition that remand for further proceedings is legally required. However,
21 beyond a cursory summary of the ALJ’s analysis of Plaintiff’s testimony, the Commissioner does
22 not point to any ambiguities in the record that actually require resolution. Dkt. 21, p. 5.

1 If Plaintiff's testimony and the improperly discredited medical opinions were credited as
2 true, particularly Drs. Wingate and Wilkinson's opinions that Plaintiff was markedly limited in
3 her ability to perform activities within a schedule, maintain regular attendance, and be punctual
4 within customary tolerances without special supervision; maintain appropriate behavior in a
5 work setting; and complete a normal workday and workweek without interruptions from
6 psychologically based symptoms, the ALJ would be required to find Plaintiff disabled on
7 remand. AR 671, 1065, 1300, 2037; *see Lingenfelter v. Astrue*, 504 F.3d 1028, 1041 (9th Cir.
8 2007) ("[W]e will not remand for further proceedings where, taking the claimant's testimony as
9 true, the ALJ would clearly be required to award benefits.").

10 Accordingly, remand for an award of benefits is the appropriate remedy.

11 CONCLUSION

12 Based on the foregoing discussion, the Court finds the ALJ erred when he determined
13 Claimant to be not disabled. Defendant's decision to deny benefits therefore is REVERSED and
14 this matter is REMANDED to the Commissioner for an award of benefits.

15 Dated this 29th day of June, 2022.

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17 David W. Christel
18 United States Magistrate Judge
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